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MICHAEL RODAK, JR., CLER

No. 80-113

In the Supreme Court of the United States

OCTOBER TERM, 1980

ANTHONY J. SCHERER, JR.,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Is offering to aid those attempting to convict Petitioner of a felony an act "hostile" to the interests of the Petitioner?

2. When one attorney represents clients with hostile interests does he have a conflict of interest?

3. When that attorney, for absolutely no reason that could favor Petitioner or which could be said to be a tactical decision, absolutely fails to cross-examine and impeach a Government agent as to an impossible event for fear of hurting a second client and that attorney himself, has Petitioner been prejudiced and thus denied his rights of effective assistance of counsel?

4. Did Petitioner deliberately bypass a known remedy?

5. Does the recent case of *Cuyler* v. *Sullivan,* ..... U.S. ....., 27 Cr L 3100 (May 12, 1980), decided nine (9) days prior to the Court of Appeals decision which does not cite that decision, completely control and additionally show the Court of Appeals decision to be incorrect and based on irrelevant issues?

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NO. _____

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OPINION BELOW

The opinion of the Court of Appeals is not reported ("unpublished order not to be cited per Circuit Rule 35"), but is printed in the Appendix to this petition (Appendix A). The opinion of the Court of Appeals was entered on May 21, 1980. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied by order entered on June 26, 1980 (Appendix C). The opinion of the District Court was entered on December 12, 1978 (Appendix F).

JURISDICTION

The judgment of the Court of Appeals was entered on May 21, 1980 (Appendix "A"). A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on June 26, 1980 (Appendix "C").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES INVOLVED

AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

This is an appeal from an order denying Petitioner relief, under 28 U.S.C. Section 2255, from a judgment and sentence entered upon his conviction for violations of the Gun Control Act of 1968, 18 U.S.C. Section 922(m).

Petitioner was represented by Julius Sherwin. Petitioner was also charged with another offense in which both he and a co-defendant in that second case, not yet on trial and before a different judge, Matthew Smytkowski, were represented by Attorney Sherwin. Attorney Sherwin represented Petitioner at trial, at the direct appeal and upon seeking direct certiorari. Petitioner's *present counsel* became aware of this issue in about 1977 and thereupon, for the first time on this newly discovered issue, moved for relief pursuant to 28 U.S.C. Section 2255.

All the events related herein occurred at the trial in which Petitioner was the sole defendant. After his conviction, the other case was dropped.

At Petitioner's trial, Matthew Smytkowski was called as a witness during a pretrial motion to suppress. Upon the Government's cross-examination of Mr. Smytkowski, Attorney Sherwin advised the Court that he represented both Petitioner and Mr. Smytkowski in a then pending criminal case (Tr. page 122-123). Attorney Sherwin, during Petitioner's trial, advised Mr. Smytkowski of his rights under the Fifth Amendment and advised him to seek protection of the Fifth Amendment and advised him specifically as to how those protections were initiated. (Tr. 122-125, Appendix E)

An exhibit introduced by the Government at trial, Exhibit 30 (Appendix D), was said to have been made by Bureau of Alcohol, Tobacco, and Firearms Special Agent Jorgensen on October 5, 1972. This document, sworn to have been made on October 5, 1972, contains an entry for October 12, 1972. In that paragraph concerning October 12, 1972, Agent Jorgensen wrote that ". . . Smytkowski commented that for $5,000.00 he would help the "G" get Tony Scherer. Smytkowski stated that he needed the money to pay his "shyster" lawyer with."

Attorney Sherwin never questioned Agent Jorgensen as to the impossibility of a document purportedly having been made on October 5, 1972 somehow containing an entry for October 12, 1972, one week after the document was supposedly written. Attorney Sherwin never questioned Agent Jorgensen on the manner in which the agent produced these documents concerning Petitioner.

The Petitioner was found guilty on some of the counts charged. A direct appeal was taken by Attorney Sherwin, who did not raise the issue now presented. Petitioner's conviction was affirmed. Attorney Sherwin sought a writ of certiorari which did not present the issue now argued

herein. Certiorari was denied, *United States* v. *Scherer*, 523 F.2d 371 (7th Cir.), *cert. denied* 424 U.S. 911 (1976).

In 1977, Petitioner's new (and present) attorney hired a law student (now co-counsel) to help determine if the documents obtained under the Freedom of Information Act, 5 U.S.C. 552, were improperly withheld by the Government during trial. (*Brady* v. *Maryland*, 373 U.S. 83 (1963)). The issue presented here was uncovered during that time and had never previously been known to Petitioner or his attorney.

Thereupon and thereafter, Petitioner sought relief under 28 U.S.C. Section 2255, alleging that Attorney Sherwin had not given him effective assistance of counsel because of a conflict of interest which occurred at trial and adversely effected his attorney's performance. The district court denied Petitioner relief.

Notice of Appeal was timely filed. The Seventh Circuit Court of Appeals affirmed the holding of the District Court. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was filed because of alleged errors in the opinion and because *Cuyler* v. *Sullivan*, 27 Cr L 3100 (May 12, 1980) was handed down by this Court prior to the Court of Appeals decision and was not cited therein. The Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied (Appendix "C"). This Writ for Certiorari timely follows that denial.

REASONS FOR GRANTING WRIT

Petitioner submits that the decision of the Court of Appeals is, to put it simply, absolutely and totally wrong and so far departed from legal precedent and logic as to call for this Court to exercise its supervisory power as a matter of judicial discretion. The decision is contrary to this Court's decisions and with many other Circuit Courts of Appeals. The decision fails to even mention Petitioner's strongest argument, decides issues that are irrelevant to the basic issue (and worse yet decides them incorrectly) and fails to recognize that *Cuyler* v. *Sullivan*, ... U.S. ....., 27 Cr L 3100 (May 12, 1980) is dispositive of most, if not all, the issues presented here (and in a way favorable to the Petitioner).

ARGUMENT

Petitioner submits that his trial attorney gave him ineffective assistance of counsel as guaranteed by the Sixth Amendment. The attorney's ineffectiveness was caused by a conflict of interest which arose at trial and should therefore have alerted the trial judge. Petitioner was prejudiced by his attorney's conflict of interest because of an absolute failure of his attorney to impeach a key Government witness as to an obvious discrepancy in his testimony and by the attorney telling the Court of a second pending criminal charge against the Petitioner. If the attorney was to have questioned the witness, a Government agent, as to that discrepancy it would have called attention to another client of the attorney's inferences of guilt and to a damaging reference to the attorney himself. The attorney also, because of the conflict of interest, prejudiced the Petitioner by advising that second client as to his rights while being

cross-examined at Petitioner's trial. The attorney, while ostensibly protecting his second client, informed the trial Court of another pending criminal charge against the Petitioner. That same attorney represented Petitioner on his direct appeal and petition for Writ of Certiorari. The attorney never raised the issue of his conflict of interest (and his own incompetence). Attorney Sherwin has been the subject of conflict of interest claims previously by other parties, *United States* v. *Mandell,* 525 F. 2d 671 (7th Cir.) *cert. denied,* 423 U.S. 1066 (1976).

At Petitioner's trial his attorney called a second client of his, Matthew Smytkowski, to the stand. Upon cross-examination of Smytkowski, the attorney advised him not to answer certain of the questions as his right under the Fifth Amendment. In asserting the privilege for his second client not on trial, the attorney informed the trial Court of a pending criminal charge against both the Petitioner and Smytkowski and told the Court that in the pending criminal charge he represented both the Petitioner and Smytkowski. The trial judge was therefore put on notice of a possible conflict of interest, *Glasser* v. *United States,* 315 U.S. 60 (1942). If it is error for the prosecution to mention other outstanding indictments because of its inherent prejudice, *United States* v. *Labarbera,* 581 F. 2d 107 (5th Cir. 1978), when Petitioner's own attorney does it, to protect a second client, it is argued it is worse and clearly shows his incompetence, *United States ex rel. Castleberry* v. *Sielaff,* 446 F. Supp. 451 (N.D. Ill. E.D. 1978).

The Government called Bureau of Alcohol, Tobacco and Firearms Special Agent James L. Jorgensen as its witness during Petitioner's trial. Agent Jorgensen had participated in the investigation of Petitioner prior to any Court actions. The Government introduced, at Petitioner's trial, a statement said to have been made on October 5, 1972 by

Agent Jorgensen (Exhibit 30 at trial, Appendix "D", attached hereto). In the very last paragraph of that statement Agent Jorgensen wrote:

> "On October 12, 1972 . . . Smytkowski commented that for $5,000.00 he would help the "G" get Tony Scherer. Smytkowski stated that he needed the money to pay his "shyster" lawyer with. Agent Balkema advised Smytkowski that he would forward his offer to the Assistant United States Attorney."

Smytkowski represented by attorney Sherwin, had offered to help the Government convict Scherer (Petitioner), also represented by Attorney Sherwin. One client of the attorney was attempting to work for and with the adversary of the attorney's other client (The name of this case is United States of America *versus* Anthony J. Scherer, Jr.). The interests of Smytkowski and Scherer represented by the same attorney were totally inconsistent and hostile to each other.

Scherer (Petitioner) obviously seeks to avoid conviction on felony charges and Smytkowski seeks to assist in Scherer's conviction for a fee of $5000.00. The Court of Appeals decision inexplicably ignores this evidence and totally fails to mention this in its opinion. The Court of Appeals decision does hold, without mentioning Exhibit 30, that Smytkowski was *not* "hostile" to Scherer.

Contrary to that characterization, it is obvious that an offer to directly aid those attempting to convict someone of felony charges, by aiding the prosecution, is a "hostile" act. Black's Law Dictionary defines "hostile" as "having the character of an enemy, standing in the relation of the enemy". Webster's 3rd New International Dictionary defines "hostile" as "of or relating to an enemy, marked by malevolence and a desire to injure, marked by antagonism

or unfriendliness". Courts have defined "hostile" as "aligned with the opposition", *Journeyman Plasterer's Protection and Benefit Society of Chicago* v. *N.L.R.B.*, 341 F. 2d 539 (7th Cir. 1965) citing *Rosano* v. *Blue Plate Foods, Inc.*, 314 F. 2d 174 (5th Cir. 1963) *cert. denied*, 375 U.S. 566 (1963).

Smytkowski's offer to help Scherer to be convicted on felony charges certainly meets those definitions. The Court of Appeals decision holding to the contrary is clearly incorrect. Worse yet, that decision does not even mention Smytkowski's offer to help an enemy of Scherer. When the Government attempted to convict Scherer it became his enemy and acted in a manner desirous of injuring him. Smytkowski sided with Scherer's enemy and thereby became his enemy "hostile" to his interests. This alone should warrant a Writ of Certiorari or outright reversal.

Petitioner notes that the exact meaning of a conflict of interest is seldom made clear, see *Cuyler* v. *Sullivan*, ... U.S. ..... 27 Cr L 3100 at 3106 (fn. 3, J. Marshall, concurring in part and dissenting in part). The term is usually meant to bespeak a situation when regard for one duty tends to lead to the disregard of another, an example being representation of clients with incompatible interests, *Goitia* v. *United States*, 409 F. 2d 524 (1st Cir. 1969) *cert. denied* 397 U.S. 906 (1969); *United States* v. *Miller*, 463 F. 2d 600 (1st Cir.) *cert. denied* 409 U.S. 956 (1972); *The Florida Bar* v. *Moore*, 194 So. 2d 264 (1966); *Jedwabny* v. *Philadelphia Transportation Co.*, 135 A. 2d 252 (1957); *Zimmer* v. *Gudmundsen*, 5 N.W. 2d 707 (Neb. 1942); A.B.A. Standards Relating to the Administration of Criminal Justice, Prosecution and Defense Function, Standard 4-35(b) (Approved Draft 1979); ABA Code of Professional Responsibility, Disciplinary Rule 5-105(A)-(B) (1978); Canons of Pro-

fessional Ethics, No. 6 (1965). But though hard to define, its evils are evident. The evil of a conflict of interest is that "it tends to prevent the attorney from doing.", *Holloway* v. *Arkansas,* 435 U.S. 475 at 489-90 (1978).

Petitioner's attorney clearly had a conflict of interest; his clients had incompatible interests. Client Scherer sought to avoid conviction and client Smytkowski sought to have Scherer convicted. Smytkowski was hostile to Scherer. Attorney Sherwin had a conflict of interest and was prevented "from doing."

"In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.", *Cuyler* v. *Sullivan,* ..... U.S. ....., 27 Cr L 3100 at 3104 (May 12, 1980). Petitioner will admit that he did not object at trial. Petitioner did not realize the import and problems that could (and did) arise at trial and how he could be (and was) prejudiced thereby. Attorney Sherwin never understood the problem and so obviously did not adequately explain the problem to Petitioner.

At trial the conflict of interest again adversely affected Petitioner's trial lawyer's performance. Exhibit 30, introduced by the Prosecution (Appendix "D") was purportedly made on October 5, 1972 by Agent Jorgensen. However it contains an entry for October 12, 1972 which states with specificity events supposedly of October 12. It is of course beyond any law of nature that Agent Jorgensen could write of events that had not taken place and were not to occur for a full week. Even respondents admit that "the date is an entry in error" (Appellee's Brief p. 12 at fn. 19). It could certainly be more than "error". Even if mere "error" it was an "error" which should have been

used to Petitioner's advantage and for no tactical reason (other than to protect Smytkowski by harming Scherer) was ignored by Attorney Sherwin. Counsel did not use this "error" effectively because to do so would point out that Smytkowski felt he was in trouble and needed to help the Government and that the attorney himself was looked upon as a "shyster". In reality Attorney Sherwin himself also had a conflict of interest with Petitioner. To cross-examine Jorgensen as to this "error" would mean damaging the attorney's own reputation.

An effective attorney representing his client zealously would certainly have used this "error" to impeach with that document, all of Jorgensen's testimony and the entire Government case against the Petitioner. Attorney Sherwin did not *in any way* use that "error" to Petitioner's advantage. It cannot be said that the failure to do that was a deliberate tactical decision that could work to Petitioner's advantage. There is no advantage to Petitioner in the failure to show that Agent Jorgensen, and in turn the entire case, was not truthful and the evidence against the Petitioner weakened. The prosecution, in its Appellate Brief, and the Court of Appeals, in its opinion, do not even speculate as to *any* possible advantage to Petitioner of his counsel's failure to cross-examine Jorgensen as to the true dates and manner in which evidence against the Petitioner was collected.

Petitioner was prejudiced by his counsel's failure to impeach Jorgensen. Counsel could have impeached Jorgensen by cross-examination. Cross-examination of a witness is a matter of right, *Alford* v. *United States*, 282 U.S. 687 at 691 (1931). Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. *Davis* v. *Alaska*, 415 U.S. 308, 316 (1974). The purpose of discrediting a witness is

to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony, *Davis* v. *Alaska,* supra.

Counsel's failure to cross-examine Jorgensen as to the obvious falseness of his statement did not give the Court an opportuntiy to infer that Jorgensen was not believable and not truthful. Falsus in uno, falsus in omnibus. "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and credibility to a test, without which the jury cannot fairly appraise them", *Alford* v. *United States,* supra, 282 U.S. at 692. A denial of the right to effective cross-examination is "constitutional error of the first magnitude and no showing of want of prejudice would cure it", *Davis* v. *Alaska,* supra, 415 U.S. at 318.

Petitioner was not given his right of cross-examination because his attorney was burdened with trying to serve two masters (maybe three including himself and to avoid a reference to him as a "shyster") with hostile and inconsistent interests. This failure to effectively cross-examine a witness to discredit him shows the attorney to be ineffective thus denying Petitioner his rights under the Sixth Amendment. This denial prejudiced the Petitioner.

The Court of Appeals decision also states the Petitioner did not raise this issue on appeal and therefore "deliberate circumvention of direct review precludes consideration of his claim of inadequate assistance of counsel." (Opinion at p. 3) Petitioner admits that Attorney Sherwin did not raise the issues of Sherwin's incompetence at either the trial, appeal or writ of certiorari level. To hold that this precludes a later attack by a different attorney means that an incompetent attorney cannot be challenged later. Relief

can be granted under Section 2255 for blotting out the essence of an appeal, *Dillane* v. *United States,* 350 F. 2d 732 (D.C. Cir. 1965), *Powers* v. *United States,* 446 F. 2d 22 (5th Cir. 1971), *Hannigan* v. *United States,* 341 F. 2d 920 (10th Cir. 1965), *Thor* v. *United States,* 574 F. 2d 215 (5th Cir. 1978). "There could scarcely be a more appropriate for allowing a Petitioner to raise issues not raised on direct appeal than where primary error complained of in the petition is a failure to process an effective appeal", *Thor* v. *United States,* supra, 574 F. 2d at 219. See also *Commonwealth* v. *James,* 398 A. 2d 1003 (Pa. 1979). Claims of ineffective assistance of counsel may properly be raised in motions to Section 2255, *Rodriquez* v. *United States,* 395 U.S. 327 (1969). This opinion is against the weight of all these authorities and against logic. Attorney Sherwin's incompetence blotted out Petitioner's trial rights, his appeal rights and his certiorari rights.

As argued before the Court of Appeals, Petitioner did not deliberately waive this issue. Petitioner is a layman and was not aware of the significance of his attorney's conflict of interest. Petitioner was unaware of the issue and its import until about 1977 when his new (and present) attorney caused the transcript of the trial to be reread.

Even if the Petitioner has not shown that he did not deliberately bypass his rights the prosecution has not shown that he did. The prosecution has that burden, *Zuck* v. *Alabama,* 588 F. 2d 436 (5th Cir.) *cert. denied,* ..... U.S. ....., 62 L Ed 2d 42 (1979), *Gray* v. *Estelle,* 616 F. 2d 801 (5th Cir. 1980). To deliberately and knowingly bypass a constitutional right, it must be intelligently waived, *Johnson* v. *Zerbst,* 304 U.S. 458 (1938). There are no facts showing an intelligent waiver. The facts of a waiver was not determined by the trial court and that determination did not appear on the record, *Johnson* v. *Zerbst,* supra. It is obvious that any waiver is not found at the trial level because

no one recognized the problem until years later. Petitioner had served nearly all his sentence at the time this Writ was filed. It strains credibility to believe that Petitioner knew of a key to his "cell" and did not use it until his remedy was almost moot. Valid waivers must both be voluntary and "knowing", intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences, *Brady* v. *United States,* 397 U.S. 742 at 749 (1970).

The Court of Appeals decision holds that a waiver occurred because Petitioner knew his counsel also represented Smytkowski. While Petitioner knew his counsel represented Smytkowski he did not know the import and prejudices that might (and did) arise. Petitioner did not intelligently waive his right to be represented by an attorney with his interests above all others. The Court of Appeals opinion and the Government's appellate Brief do not show an iota of evidence that Petitioner understood the problem of his attorney representing another who had offered to help convict him.

On January 7, 1980, the Court of Appeals heard oral argument in this case. On May 12, 1980, the Supreme Court of the United States rendered a decision and opinion in the case of *Cuyler* v. *Sullivan,* ..... U.S. ..... (No. 78-1832, 27 Cr L 3100). On May 21, 1980 the Court of Appeals decided this case. The decision of the Court of Appeals does not cite *Cuyler* v. *Sullivan,* supra. On May 30, 1980 Petitioner filed a Petition for Rehearing and Suggestion for Rehearing En Banc with the Court of Appeals. Thereafter, Petitioner became aware of *Cuyler* v. *Sullivan,* supra, and moved, on June 4, 1980, for leave to file memoranda and argument in support thereof, of additional and new authority in support of his Petition for Rehearing and Suggestion that Rehearing be *En Banc.* That motion was

granted on June 6, 1980. On June 26, 1980, the Court of Appeals denied Petitioner's Motion for Rehearing and Suggestion for Rehearing *En Banc.*

Therefore the Court of Appeals has held that *Cuyler* v. *Sullivan,* supra, changes nothing or adds nothing to its decision. Petitioner submits that *Cuyler* v. *Sullivan,* supra, is completely dispositive of the issues herein (or at the very least is dispositive of the important issues herein). The Court of Appeals' failure to recognize the import and bearing of *Cuyler* to this case again shows the decision of the Court of Appeals to be faulty.

The Supreme Court held that certiorari was granted in *Cuyler* (at 444 U.S. 823) "to consider recurring issues left unresolved" by other cases (..... U.S. ....., 27 CrL 3100 at 3102). The Supreme Court definitely states that *Cuyler* breaks new ground. The Court of Appeals failed to recognize this.

"In order to establish violations of the Sixth Amendment, a defendant who raises no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.", *Cuyler* v. *Sullivan,* ..... U.S. ....., 27 CrL 3100 at 3104 (May 12, 1980). Petitioner submits, and likewise submitted to the Court of Appeals, that this single sentence controls this case. The Court of Appeals by failing to rewrite its opinion or order reargument, holds otherwise. This alone shows the incorrectness of the Court of Appeals decision.

In meeting the test announced in *Cuyler,* supra, Petitioner has shown that, though he raised no objection at trial, an actual conflict of interest adversely affected his lawyer's performance. The conflict of interest is shown by Petitioner's counsel representation of Smytkowski who had offered to help Petitioner get convicted. The attorney was working for a client seeking acquittal and a client

seeking conviction of the same person in the very same case. By not attacking the falsehood of Exhibit 30, Counsel was also protecting his own reputation at the expense of Petitioner. A conflict could not be clearer. Counsel informed the trial Court of a pending felony charge against Petitioner. This also adversely affected Petitioner's lawyear's performance, in that counsel failed to cross-examine Agent Jorgensen as to an absolute falsehood, which would have intended to impeach him and weaken the evidence against Petitioner, because to do so would put an inference of guilt by Smytkowski and a damaging reference to himself, under greater scrutiny. To protect Smytkowski and himself, the attorney failed to cross-examine Jorgensen. By representing two (three?) masters whose interests did not coincide (and were hostile) the attorney was forced to do for one client and not do for another. He did not do for Petitioner. No one, the Court of Appeals, the District Court or the United States has even suggested a reason for not cross-examining Jorgensen as to this obvious discrepancy. Petitioner was adversely effected because he was denied his right to cross-examination which would have put Jorgensen's testimony, and as a result, the entire case against Petitioner, in a much weaker light, *Alford* v. *United States,* supra, *Davis* v. *Alaska,* supra.

It also must be noted that the issue of a "deliberate bypass", found to be important by the Court of Appeals, is not even discussed by the Supreme Court though, like Petitioner, "At no time did Sullivan or his lawyers object to the multiple representation, *Cuyler* v. *Sullivan,* supra, ... U.S. ....., 27 Cr L at 3101. Again this shows that the Court of Appeals decision is wholly incorrect.

Petitioner's interests and Smytkowski's interests were hostile. They were both represented by the same attorney who therefore had a conflict of interest. Trial counsel de-

nied Petitioner effective assistance of counsel because his performance was adversely affected by an actual conflict of interest. That conflict of interest arose during the trial. Counsel informed the trial Court of a felony charge pending against Petitioner to protect Smytkowski. Counsel's performance was again affected because an absolute failure to impeach Agent Jorgensen who testified on October 5, 1972 he knew what happened on October 12, 1972. To bring up this "error" would have brought other statements under greater scrutiny and shown Smytkowski to be inferring guilt and shown that the attorney was thought to be a shyster by one of his clients. Petitioner, if this issue is relevant, did not deliberately bypass a known right intelligently. No iota of evidence even infers this. *Cuyler* v. *Sullivan* controls this case and the failure of the Court of Appeals to so hold, by rewriting its opinion or ordering reargument, shows its opinion to be faulty. Petitioner was denied his rights to effective assistance of counsel which denied him his rights guaranteed by the Sixth Amendment.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully submits that this Petition for Writ of Certiorari be granted.

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APPENDIX

APPENDIX

APPENDIX "A"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
(ARGUED JANUARY 7, 1980)
May 21, 1980.

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Bauer, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 79-1342 vs.

ANTHONY J. SCHERER, JR.
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 74 CR 99
James B. Parsons, Judge.

ORDER

Defendant-appellant Anthony J. Scherer appeals from the order of the district court denying his petition for a writ of habeas corpus under 28 U.S.C. § 2255, in which he moved the court to vacate the judgment and sentence entered upon his conviction for violations of the Gun Control Act of 1968, 18 U.S.C. § 922(m). We affirm.

I

On January 31, 1974, a federal grand jury returned an eleven count indictment charging that Scherer, as a dealer in firearms, knowingly and unlawfully failed to record the disposition of certain firearms in violation of Title 18, United States Code, Section 922(m) (counts one through nine and eleven). The indictment further charged that Scherer knowingly and unlawfully received and possessed a certain firearm not registered to him in violation of Title 26, United States Code, Section 5861(d) (count ten).

On November 4, 1974, the defendant waived his right to trial by jury and proceeded to an eleven day bench trial before Chief Judge Parsons. On November 19, 1974, the trial court entered a finding of guilty on counts one through nine and not guilty on count eleven (count ten was dismissed previously). On December 13, 1974, Scherer was sentenced to a concurrent term of two years in custody on each of counts one through nine. This Court affirmed the conviction on November 19, 1975. *United States* v. *Scherer*, 523 F.2d 371 (7th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

On March 12, 1976, the trial court reviewed the defendant's motion for a reduction of sentence and reduced the sentence to seven months in custody, to be followed by three years' probation. On May 26, 1976, the court granted the defendant's second motion for reduction of sentence and reduced the period of incarceration to time served.

On July 7, 1978, the defendant filed the instant petition alleging three grounds for federal habeas relief: (1) that his Sixth Amendment right to adequate representation was violated by an alleged conflict of interest on the part of his retained counsel; (2) that his Fifth Amendment right to due process was violated by the government in knowing-

ly permitting false or perjured testimony by their informant witness and by wilfully refusing to disclose evidence favorable to the defendant; and (3) that the government employed illegal electronic surveillance against him in violation of his Fourth Amendment rights. On December 18, 1978, the district court found each of these grounds to be without merit and accordingly denied the petition. The defendant now appeals from that adverse decision to this Court.

II

In his first argument on appeal, the defendant asserts that he was denied adequate assistance of counsel because his privately retained counsel also served as counsel for a witness called by the defense at a pretrial hearing on a motion to suppress physical evidence. Citing that portion of the record where, during cross-examination of the witness by the government, Scherer's counsel instructed the witness to assert his Fifth Amendment privilege, Scherer contends that his counsel was "attempting to serve two masters," that the conflict appeared clearly on the record, and that the trial court declined to invoke remedial measures when the situation arose. Scherer accordingly argues that he established a showing of inadequate assistance of counsel sufficient to require that his conviction be vacated. We disagree.

As a threshold matter, it is axiomatic that a motion attacking a judgment and sentence is not cognizable under Section 2255 where used as a substitute for direct appeal, and even where, as here, a constitutional issue is raised, the defendant's deliberate circumvention of direct review precludes consideration of his claim of inadequate assistance of counsel. *Davis* v. *United States,* 411 U.S. 233, 240 (1973). Although Scherer's arguments in support of this claim are based entirely upon facts set forth in the

trial court record, he did not present these arguments either in the trial court or in the direct appeal of his conviction to this Court. *See United States* v. *Scherer*, 523 F.2d 371 (7th Cir. 1975).

Moreover, the defendant's reliance on *Holloway* v. *Arkansas*, 435 U.S. 475 (1978) is misplaced. In *Holloway*, the Supreme Court held that the trial judge's failure to appoint separate counsel for the co-defendants or to take adequate measures to ascertain whether the risk of a conflict of interest was too remote to warrant separate counsel constituted a violation of the Sixth Amendment guarantee of assistance of counsel, where the attorney requested appointment of separate counsel based upon his representations regarding a conflict of interest in jointly representing co-defendants. *Id.* at 484. The Supreme Court also held in *Holloway* that joint representation of co-defendants or hostile witnesses by a single attorney, absent a specific showing of a conflict of interest is not *per se* violative of the constitutional guarantee of effective assistance of counsel. *Id.* at 482. However, the considerations found controlling in *Holloway* are not present in the case at bar. Scherer's counsel represented Matthew Smytkowski, a co-defendant with Scherer in another case. Thus, Smytkowski was neither a co-defendant in the present case nor a hostile party or witness. He was called by the defense for the limited purpose of testifying that the government informant was aware that certain defense exhibits were toy replicas and not genuine weapons. During cross-examination of Smytkowski by the government, Scherer's counsel foreclosed a line of government cross-examination by advising Smytkowski, as his attorney, to assert his Fifth Amendment privilege.

Nor has the defendant met his burden of alleging and showing specific, actual prejudice and conflict of interest.

This burden is particularly heavy since the record shows that he was aware of counsel's dual representation before, during and long after the trial. *See, e.g., United States* v. *DiCarlo,* 575 F.2d 952, 957 (1st Cir. 1978). Furthermore, even the fact that a defense attorney may be unable to pursue one line of inquiry does not render the defendant's representation inadequate. *United States* v. *Jeffers,* 520 F.2d 1256, 1265 (7th Cir. 1975). The mere possibility that some item of favorable evidence was undisclosed because of the dual representation of defense counsel is insufficient to require that a conviction be vacated on grounds of conflict of interest. *See, e.g., United States* v. *Corr,* 434 F. Supp. 408, 414 (S.D. N.Y. 1977). Where, as here, the defendant does not even allege such a possibility and the line of inquiry that was precluded was the government's cross-examination, the absence of any actual prejudice or conflict of interest is manifest on the face of the record.

Finally, we find the defendant's further assertion that the trial court failed to take appropriate action when defense counsel's dual representation became known to be patently meritless. The cited portions of the transcript showed only the fact of dual representation without any evidence of actual prejudice or conflict of interest. Neither the decisions of the Supreme Court nor this Court place any affirmative duty on the trial judge to terminate dual representation in the absence of any indication of actual prejudice and conflict of interest and without any request from a defendant or defense counsel to do so. *Holloway* v. *Arkansas,* 435 U.S. 475, 483-84 (1980); *United States* v. *Gaines,* 529 F.2d 1038, 1043 (7th Cir. 1976). We therefore conclude that the defendant has failed to establish a violation of his Sixth Amendment right to assistance of counsel.

III

The defendant next contends that his Fifth Amendment right to due process was violated in that the government knowingly allowed either false or perjured testimony by its informant-witness, George J. Rivard, to be introduced at trial and that it failed to disclose evidence favorable to the defendant prior to trial. In support of this contention Scherer cites Rivard's trial testimony that he did make a written record of his dealings with the defendant and then cites a two-page handwritten document signed by the informant which Scherer asserts was purportedly prepared by the informant and which was never provided to the defendant at trial. We find this contention devoid of merit.

Rivard testified at trial that after each meeting with the defendant, he would report to ATF agents who would record in handwritten form what he had told them concerning his contacts with the defendant. These statements to the agents were compiled in a seven-page typewritten document which was tendered to Scherer's counsel prior to cross-examination and was marked as Defense Exhibit A-1. It is apparent from an examination of that exhibit that it recorded the information contained in the handwritten document which Scherer now contends he never received. It is also apparent from the testimony at trial and from the face of the two-page document that it was handwritten by ATF agents to record what the informant had told them and that it was merely signed by the informant. Accordingly, there is no basis for the defendant's allegations of perjury or failure to disclose evidence.

IV

In his petition for federal habeas corpus relief, the defendant alleged that his Fourth Amendment rights had been violated by the government's use of illegal electronic surveillance against him. Scherer requested that the government be required to respond by affidavit whether such surveillance had been employed and further requested a hearing on the legitimacy of that surveillance. This allegation is apparently abandoned by the defendant on appeal from the denial of his petition, although we observe that the government did file an affidavit that there had been no electronic surveillance of the defendant or any premises known to be owned, leased or licensed by him. However, the defendant now contends that he was deprived of his Fourth Amendment rights when the proceeds of a warrantless search were used to obtain his conviction. As this issue was not presented for review by the district court in the defendant's Section 2255 petition, we decline to address it on appeal. *Holmes* v. *United States,* 323 F.2d 430 (7th Cir. 1963).

For the foregoing reasons, the judgment appealed from is affirmed and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED.

APPENDIX "B"

Unpublished Per Curiam Order

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 21, 1980

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Bauer, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1342 vs.

ANTHONY SCHERER,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 74-Cr-99
Judge *James B. Parsons*

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the order of this court entered this date.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 26, 1980.

Before
Hon. Luther M. Swygert, Circuit Judge
Hon. Robert A. Sprecher, Circuit Judge
Hon. William J. Bauer, Circuit Judge

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 79-1342 vs.

ANTHONY SCHERER, JR.,

Defendant-Appellant.

On Petition for Rehearing and Suggestion for Rehearing *En Banc.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the defendant-appellant, Anthony J. Scherer, Jr., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX "D"

STATEMENT OF

James L. Jorgensen, Special Agent
Bureau of Alcohol, Tobacco and Firearms,
Chicago, Illinois, made at
35 E. Wacker Drive, Chicago, Illinois, on
October 5, 1972.

On February 11, 1972, Special Agents Balkema, Gleba, Stieman and this Agent maintained a moving surveillance by automobile of a motor vehicle driven by George J. Rivard, IV, and containing a passenger known to me as Matthew Smytkowski. The surveillance was begun at approximately 6:00 p.m. and was discontinued at approximately 1:00 a.m., February 12, 1972.

The motor vehicle bearing Rivard and Matthew Smytkowski was observed to travel the following route and made the following stops:

From Rivard's residence, Long Grove, Illinois, North on Illinois Route 83 to Route 22; Route 22 East to Riverwoods Road; Riverwoods Road North to Smytkowski residence; Stop at Smytkowski residence; From Smytkowski residence South on Riverwoods Road to Route 22; Route 22 West to Milwaukee Road, Half Day, Illinois; Stop at Foote's Tavern; South on Milwaukee Road one (1) block to Route 22; Route 22 West to Route 83; Route 83 South to Route 53; Route 53 Southeast to Route 60; Route 60 West to Route 72; Route 72 West to Gallagan Road; Gallagan Road North to Freeman Road; Freeman Road West to Anthony Scherer's driveway immediately West of Chicago Northwestern Railroad Tracks; North on Scherer's driveway; Stop.

The motor vehicle bearing Rivard and Smytkowski left the Scherer Farm at approximately 11:30 p.m. and traveled back to Smytkowski's home in Lake Forest, Illinois, where he left Rivard, and then Rivard traveled to his home in Long Grove, Illinois.

On March 25, 1972, Special Agents Balkema, Gleba, Stieman, and this Agent maintained a moving surveillance by automobile of a motor vehicle driven by Rivard. The vehicle was observed to leave the Rivard residence at approximately 4:00 p.m. The vehicle traveled the above-described route with the addition that it made a stop at a tavern in Gilberts, Illinois at the intersection of Route 72 and Gallagan Roads. This agent discontinued participation in the surveillance at approximately 5:15 p.m.

On September 20, 1972, acting in my capacity as a Special Agent, I entered property known to me as the Tony or Anthony Scherer farm, Gilberts, Illinois, at approximately 11:45 a.m. in the company of Rivard. Rivard and I pulled up to the farmhouse in Rivard's vehicle. At that time a female, identified to me as Liz Scherer came out of the house, and greeted us. Rivard stated that I was his cousin, Jim Moore, and that we had come to work on duck blinds as per our previous agreement with Tony Scherer. Liz Scherer stated that she was aware of our reason for coming and she invited us into the house for a soda. She then stated that Tony had expected us to come today, but was unexpectedly called away to paint a house. His instructions were that we should just go ahead with our work on the duck blinds without him and that he would probably be back about 4:00 p.m. After drinking the soda, Rivard asked Liz Scherer where the tools were and Liz stated that she didn't know but that we should look around the farm for ourselves. Rivard

and I then left the kitchen of the farmhouse and proceeded to look around various parts of the farmyard and the barn, both upstairs and downstairs, for the tools necessary to construct the duck blinds. Rivard and I found the tools necessary and proceeded to work on the duck blinds. Within a short time however, we ran out of wood. Rivard went back to the farmhouse and asked Liz Scherer where we might find additional wood with which to construct the blinds. Liz stated, however, that she didn't know and she proceeded to lead us around various parts of the house including the attic in an attempt to find additional wood. She then lead us outside the house to various parts of the barn in a search for wood. Liz Scherer then suggested that we look around for ourselves and use whatever wood we could find. Then Rivard and I began to look in various rooms and parts of the Scherer barn for the necessary wood. While in the process of looking for wood, I noticed the barrels and foregrips of what appeared to be two (2) Thompson machine guns protruding from a stock of boxes in one of the rooms of the barn. I approached the two guns and looked down at what appeared to be two (2) Thompson machine guns. One gun had what appeared to be home made parts. I examined both machine guns and was able to determine that there were no serial numbers on either gun. The first gun appeared to be a military model, Thompson, .45 caliber machine gun, and the second to be a civilian model Thompson .45 caliber machine gun, with home made parts. The military model had a wooden bolt and the civilian model had home made shiny metal parts on the trigger housing. Neither gun had serial numbers on it. We continued to work on the duck blinds and left the Anthony Scherer farm at approximately 1:00 p.m.

On September 23, 1972, I again entered property known to me as the Anthony Scherer farm, Gilberts, Illinois, in the company of Rivard. We went into the farmhouse and were greeted by a female known to me as Liz Scherer. Rivard stated that we had come to try a little hunting and to continue work on the duck blinds. Rivard and I got our shotguns and went out into one of the nearby fields. I discovered that the firing pin on my shotgun was broken so we went back to the farmhouse. Liz Scherer stated that I could use one of her husband's Tony's shotguns. I took that shotgun and went to the field in an attempt to hunt. We later returned to the farmhouse, replaced the gun, and stated to Liz Scherer that we were going to continue work on the duck blinds. Liz Scherer stated that we should look around for the wood and to help ourselves to the tools. We began to work on the duck blinds and Liz Scherer came out of the house with her two children. She stated that she wanted to go to the store as per a previous agreement. Rivard said to me that he was going to take her. Liz Scherer stated to me that if the phone rang I should go into the house, answer it, and take a message. Rivard, Liz Scherer and her two children then departed in Rivards vehicle at approximately 10:00 noon. At that time I continued to work on the duck blinds, and in the process of looking for more wood, I noticed that barrels of the two Thompsons which I had seen on September 20, 1972, were still in the same position as I had left them on that date. Rivard, Liz Scherer and her children returned at approximately one half hour later, at 12:30 p.m. I was in the house at the time of their return having taken a message from the telephone. I stated to Liz Scherer that there was a gentleman on the phone interested in buying one of her kittens. She thanked me and went in to take the telephone call. She then requested that I carry her baby into the house, which I did.

I returned to the outside and continued working on the blinds with Rivard. At approximately 1:00 p.m. the two of us drove around the neighboring fields in search for game, after which at approximately 1:15 p.m. Rivard went into the Scherer farmhouse and stated that we were going to leave. At 1:15 p.m., we departed the Anthony Scherer farm.

On October 4, 1972 I was acting in my capacity as Special Agent, Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms, and participated in the execution of a Federal Arrest Warrant for Anthony Scherer, and a Federal Search Warrant for the premises known to me as the Tony or Anthony Scherer Farm, Gilberts, Illinois.

I entered the property at approximately 7:10 a.m. in the company of other Special Agents of the Bureau of Alcohol, Tobacco and Firearms and officers of the Illinois State Police. Special Agent Stieman went to the rear door of the Scherer farmhouse, identified himself as a Federal Agent, and proceeded to state in a loud voice that he was in possession of a Federal Warrant to search the premises. Agent Stieman and I entered the farmhouse and were confronted by a screaming female known to me as Liz Scherer. Agent Stieman and I proceeded to go to the second floor where I saw and heard Agent Daniel Hartnett state to Anthony Scherer that he was under arrest for violation of the Gun Control Act of 1968. I saw and heard Agent Hartnett advise Scherer of his Constitutional Rights. Scherer stated that he had his attorney on the telephone and advised his attorney that he was being advised of his Rights. I heard Scherer state that he understood his Rights.

At approximately 8:00 a.m. on October 4, 1972 I left the Scherer farm in the company of Special Agents Gleba, Balkema and Borcia. We proceeded to 1816 N. Milwaukee Avenue, Chicago, Illinois where I saw and heard Agent Borcia state to Matthew Smytkowski that he was under arrest for violation of the Gun Control Act of 1968. I saw and heard Agent Borcia advise Smytkowski of his Constitutional Rights, and heard Smytkowski state that he understood those Rights. Smytkowski was transported to the Bureau of Alcohol, Tobacco and Firearms Crime Laboratory, and then to the United States Marshall's Lockup. At approximately 1:00 p.m. Smytkowski appeared before Magistrate James Balog and was released on an OR Bond in the amount of $5,000.00.

On October 12, 1972, while assigned to a protection detail at Rivard's residence in Halfday, Illinois with Agent Balkema, Smytkowski came to Rivard's house to pick-up some phonograph records and a saddle. Agent Balkema admitted Smytkowski into the house, however, cautioned him not to say anything regarding his recent arrest. When in the house and after receiving his records and saddle, Smytkowski stated that he would like a share of the $30,000.00. I then advised Smytkowski of his Constitutional Rights, after which, he stated he understood. Agent Balkema and I then escorted Smytkowski from the house to his truck, where he again stated he wanted a share of the $30,000.00. Agent Balkema told him his statement was ridiculous, after which, Smytkowski commented that for $5,000.00 he would help the "G" get Tony Scherer. Smytkowski stated that he needed the money to pay his "shyster" lawyer with. Agent Balkema advised Smytkowski that he would forward his offer to the Assistant United States Attorney.

/s/ *James L. Jorgensen*
James L. Jorgensen
Special Agent

APPENDIX "E"

MR. SHERWIN: Pardon me. I am going to object and now advise my client, reconsidering our position, in view of the pendency of an indictment in which he is charged with having procured, aided and abetted Anthony Scherer in making a sale without having a 4473 Form signed by Rivard, I am going to advise him to refuse to answer on constitutonal grounds.

I say that advisedly knowing that—or urging that that should not affect his credibility as to all of the other occurrences involving the two exhibits. It is on the basis of the two exhibits that the search warrant issued.

THE COURT: Very well. He may give his answer to the question to the record.

MR. BOBB: I shall repeat the question.

BY MR. BOBB:

Q. Directing your attention to February 11, 1972—

A. I don't understand this. Mr. Sherwin, may I—may I talk to my attorney?

MR. SHERWIN: No; let me—may I state for the record—

MR. JONES: Your Honor, the government would have no objection if Mr. Sherwin wants to, off the record, talk to the witness and advise him of his constitutional rights. We are not requiring any advice in open court.

MR. SHERWIN: I will do it as a matter of record. Judge. I have nothing to conceal.

Mr. Smytkowski, you have already indicated to the Court, without giving the number, that you are a co-defendant in a one-count indictment with Anthony Scherer which is pending before Judge Marshall, the prosecution will agree that it is Indictment 74 CR 95.

Do you understand that?

THE WITNESS: Yes.

MR. SHERWIN: As a defendant you have a right under the Constitution of the United States, the Fifth Amendment thereto, to refrain from giving any answers that might tend to incriminate you. Do you understand that?

THE WITNESS: I do.

MR. SHERWIN: My advice to you is, with his Honor's permission and affording me this opportunity to so advise you, any inquiry concerning the subject matter of that indictment I respectfully suggest that you avail yourself of your constitutional right to say, "I refuse to answer because my answer might tend to incriminate me."

BY MR. BOBB:

Q. Directing your attention to February 11, 1972, were any firearms sold by Mr. Scherer—

A. I refuse to answer that—

Q. (Continuing:) —to Mr. Rivard?

A. —under the Fifth Amendment.

MR. SHERWIN: Have you completed the answer?

THE COURT: He said he refuses to answer on the Fifth Amendment.

MR. SHERWIN: Oh. I didn't hear the answer. All right.

MR. BOBB: May I have one moment, your Honor?

THE COURT: Is the prosecution in a position to post the question?

MR. BOBB: Yes, your Honor.

THE COURT: You do post the question?

MR. BOBB: I have further questions with regard to February 11th, your Honor.

THE COURT: No, I mean, do you post that question? Do you post the question? If you post the question then I will inquire of the witness.

MR. BOBB: May I have one moment, your Honor?

THE COURT: Yes.

(Government co-counsel conferred.)

MR. BOBB: I am not sure I understand what your Honor desires.

THE COURT: Well, in reviewing your notes—

MR. BOBB: Yes?

THE COURT: —if you conclude that you really believe that it won't incriminate him, then I have a right to ask him or you ask me to pose the question and I ask him, "Do you veritably believe that a truthful answer to that question would in fact tend to incriminate you?"

MR. BOBB: Yes, your Honor. I apology—

THE COURT: All it does is preserve the record. That is all it needs.

MR. BOBB: Right.

THE COURT: If, on the other hand, your information indicates that it might tend to incriminate him, then you need not ask the question be posted.

MR. BOBB: Fine. Thank you, your Honor.

BY MR. BOBB:

Q. Mr. Smytkowski, I would like to ask you a few more questions about February 11, 1972.

Was there a sale of an AR 180 on that evening?

A. I refuse to answer that question on the ground it might tend to incriminate me.

Q. Did Mr. Rivard pay $225 on that evening for an AR 180?

A. I refuse to answer that question on the ground it might tend to incriminate me.

Q. Was a .22 caliber Hornet offered for sale by Mr. Scherer to Mr. Rivard on that evening?

A. I don't remember, sir.

Q. Did you have occasion to leave the Scherer premises.

APPENDIX "F"

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANTHONY J. SCHERER,

Defendant.

No. 74 CR 99

MEMORANDUM OPINION AND ORDER

Before me is petitioner-defendant's motion to vacate judgment and sentence pursuant to 28 U.S.C. §2255[1]. In support of his motion petitioner argues that he received inadequate representation at trial due to counsel's conflict of interest and that the government knowingly used false or perjurious testimony. Both allegations will be addressed.

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[1]The relevant portion of 28 U.S.C. §2255 reads:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

INADEQUATE REPRESENTATION

Petitioner Scherer alleges that he was denied adequate representation of counsel since his "counsel was attempting to serve two masters." (Defendant's Memorandum p. 4, October 24, 1978). The events leading to the alleged conflict occurred during a pretrial hearing on defendant's motion to suppress physical evidence. At the hearing petitioner's counsel called one Matthew Smytkowski to testify in support of the motion. Petitioner's counsel represented Mr. Smytkowski with Anthony J. Scherer in another case (Transcript 123). During the cross-examination by the government, petitioner's counsel advised Symtkowski to assert his Fifth Amendment privilege (Transcript 117-125). Specifically, petitioner argues that since his counsel could not advise one client without deleteriously affecting the interests of the other, a conflict appeared clearly on the record and the trial court failed to properly address it, citing *Glasser* v. *U.S.*, 315 U.S. 60 (1942).

I should indicate at the outset that Petitioner's claim of conflict resulting from joint representation may miss their mark entirely inasmuch as Smytkowski was not a co-defendant in the present case. Assuming *arguendo,* however, that dual representation did occur, petitioner has failed to demonstrate actual conflict of interest. Joint representation is not a *per se* violation of constitutional guarantees of effective assistance of counsel. *Holloway* v. *Arkansas,* ..... U.S. ..... 90 S.Ct. 1173 (1978).

In *Glasser, supra,* the U.S. Supreme Court held that by requiring an attorney to represent two co-defendants whose interests were in conflict, the District Court had denied one of the defendants his Sixth Amendment right to effective assistance of counsel. Since *Glasser,* although courts have differed on how strong a showing of conflict

must be made or how certain the court must be that the asserted conflict existed before concluding that a defendant was deprived of his right to effective assistance of counsel, one principle emerges without ambiguity. That is, an actual conflict must be demonstrated.[2] Here, petitioner has failed to show that representation of one client, not a co-defendant, actually conflicted with the interests of the defendant.

USE OF FALSE TESTIMONY

The petitioner next contends that the government violated his Fifth Amendment right to due process by knowingly allowing either false or perjured testimony by the government informant and failing to disclose evidence favorable to petitioner.

Petitioner alleges that the government's informer failed to respond accurately when asked, "Did you in all of your dealings with Scherer ever record anything in a notebook?" (Tr. 522), since a two page handwritten report containing information of the informer's dealings with petitioner was later discovered (Defendant's Memorandum October 24, 1978). I find, however, that no due process violation occurred. First there is no indication that the recorded information actually was written by the informer. Second, and more importantly, the information

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[2]For example, in *U.S.* v. *Gaines,* 529 F.2d 1038 (7th Cir. 1976), a conflict of interest was specifically shown where defense counsel who represented a prisoner and two co-defendants at trial chose not to call the prisoner to testify since the prisoner would have been subject to cross-examination on the basis of a confession which incriminated co-defendants. The Seventh Circuit held that since the prisoner was deprived of an opportunity to repudiate his confession, the attorney's representation of the prisoner created a conflict of interest and the prisoner was denied effective assistance of counsel.

contained in the document is represented in Defense Exhibit A-1 at page 2-3. (Governments Memo, November 30, 1978). This document was apparently tendered to defense counsel prior to trial since reference to it was made at trial. (Tr. 562, 572-73) I therefore find that petitioner's allegation here meritless.

Finally, petitioner requests governmental response to their allegation that electronic surveillance may have been employed to gain information against him. The great weight of authority indicates that a mere suspicion of illegal government electronic surveillance does not trigger government obligation to respond. *U.S.* v. *Yanagita,* 552 F.2d 940, 943 (2d Cir. 1977); *In re Millow,* 529 F.2d 770, 775 (2nd Cir. 1976).

Wherefore, for the foregoing reasons, petitioner-defendant's petition to vacate judgment and sentence pursuant to 28 U.S.C. §2255 for the reasons he has tendered above should be and it hereby is denied.

In addition to the reasons heretofore mentioned for denial, there exist substantive jurisdictional limitations on the use of 28 U.S.C. 2255 which would preclude petitioner's motion. Section 2255, strictly construed, authorizes me to reexamine petitioner's sentence only, and not to review the judgment. While it is true that a few courts have read the statute broadly to permit reexamination of the judgment, even this has not occurred where a defendant has had a full day in federal court, i.e., where the judgment has had the benefit of appellate review. In the present situation, petitioner has had a full day in federal district court, in that his case has been reviewed by the U.S. Court of Appeals and certiorari was denied by the U.S. Supreme Court. Therefore, 28 U.S.C. 2255, under the circumstances here, authorizes me to re-

view only the sentence imposed on the petitioner, a matter he has not presented in his petition. It does not permit me in effect to re-open a fully litigated matter. *Houser* v. *U.S.*, 508 F.2d 509, 513 (8th Cir. 1974) (motion attacking sentence cannot be used as a substitute for direct appeal from the judgment of conviction.) Occasionally Courts have read 2255 as a motion to vacate sentence and judgment and grant a new trial on the basis of newly discovered evidence. This occasionally occurs when the petition is *pro se*. Here, however, petitioner is represented by counsel. I need not read the petition other than in the language in which it is presented. Even were I inclined to allow that breadth in pleadings, the petition would be denied, because petitioner has not indicated that he was unaware of any of the matters about which he complains during the trial. Contrarily, it appears that, prior to the pretrial hearing for example, he *was aware* of the fact that his counsel represented Smytkowski. (Government's Memorandum, November 30, 1978, p. 3-4).

For all the reasons mentioned above, petitioner's motion to vacate judgment and sentence should be and it hereby is denied.

ENTER:

/s/ *James B. Parsons*
JAMES B. PARSONS
United States District Judge

December 18, 1978